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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 583

D. B. ANDERS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that this Court grant rehearing of its order of December 8, 1969, denying the Petition for Writ of Certiorari, and requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed herein by the petitioner on September 12, 1969.

REASON FOR GRANTING REHEARING AND ISSUING THE WRIT

As mentioned in the Petition for Certiorari filed herein (at Page 7), there is currently pending before the Court of Appeals for the Ninth Circuit a case involving the same issue involved in the instant case. Petitioner is advised that the case before the Court of Appeals for the Ninth Circuit (*Spitalny* v. *U. S.*) will be orally argued before that Court in the near future. Petitioner submits that its Petition for Certiorari filed herein and its reply brief filed herein graphically indicate that the issue involved in the instant case is of significant national importance and that should the *Spitalny* case be decided contrary to the instant case, the petitioner would be placed in the anomalous position of having been denied certiorari, followed by an immediate split in the Courts of Appeal, during which time the petitioner's time to file a petition for rehearing would have lapsed.

The petitioner therefore requests of the Court that it grant rehearing on the Petition for Certiorari filed herein to the extent of awaiting disposition of the *Spitalny* case by the Court of Appeals for the Ninth Circuit. Should the Court of Appeals for the Ninth Circuit rule in taxpayer's favor in the *Spitalny* case, petitioner submits that there would at that time be a clear difference between two Courts of Appeals on the same issue and that this Court at that time should give serious consideration to granting the writ of certiorari in the instant case.

In support of this petition for rehearing the petitioner calls the Court's attention to the decision by the Court of Appeals for the Ninth Circuit in the case of *Commissioner*

of Internal Revenue v. *South Lake Farms, Inc.*, 324 F.2d 837 (9th Cir. 1963). In that case the Court had before it a liquidation which had occurred under Sec. 336 of the Internal Revenue Code (clearly a companion statute to Sec. 337), in which the Court of Appeals for the Ninth Circuit refused to follow the tax benefit rule. The only difference between the instant case and the *South Lake Farms* case was that in *South Lake Farms* a corporation sold its stock to another corporation. Following the acquisition the acquiring corporation liquidated the old corporation under Sec. 334(b)(2) of the Internal Revenue Code of 1954. The cost of raising barley and cotton had been deducted by the taxpayer corporation prior to the sale of its stock. There the Commissioner of Revenue argued that the tax benefit rule should be applicable, but the Court of Appeals for the Ninth Circuit refused to apply the tax benefit rule. The Court of Appeals indicated that if this is an undesirable result the remedy is for Congress, not the Courts.

Petitioner submits that the ruling in *South Lake Farms, Inc.* certainly is some indication of the fact that the Court of Appeals for the Ninth Circuit has previously rejected the application of the tax benefit rule to a corporate liquidation statute. It is therefore not farfetched on the part of petitioner to submit that at the very least the Court in the *Spitalny* case will be confronted with deciding whether or not their reasoning as applied to Sec. 336 of the Code in the *South Lake Farms* case is also applicable to Sec. 337. If that Court should agree that it is, its decision will be contrary to the Court of Appeals in the instant case and a clear split of authority will have developed.

In the event of such a split of authority, at which time the time for a petition for rehearing under this Court's

rules would have expired, the petitioner will be in the unjust position of having been denied certiorari within a very short time prior to the time that a split of authority developed. Petitioner submits that such an anomaly should not be countenanced by this Court and that the petition for rehearing should be granted to the extent of awaiting the ruling of the Court in the *Spitalny* case before the petition for certiorari in the instant case is finally ruled upon.

Furthermore, the net effect of the *South Lake Farms* case in the Ninth Circuit and the instant case in the Tenth Circuit is to repeal Sec. 337. As stated in petitioner's Petition for Certiorari, the purpose in passing Sec. 337 was to eliminate a distinction in corporate liquidations between whether a sale was made in connection with such liquidation by the corporation or the stockholders. The net effect of the ruling in *South Lake Farms* is that the stockholders, in a hypothetical sale following a liquidation distribution, can make the sale without fear of application of the tax benefit rule. On the other hand, under the *Anders* case, if the corporation makes the sale then the tax benefit rule is applicable. The effect of these two decisions at one fell swoop is to bring back the fine distinction in the law which Congress thought it was eliminating by the 1954 Code.

CONCLUSION

For the reasons set forth above and in its petition for writ of certiorari, it is respectfully urged that rehearing be granted, to await the decision of the Court of Appeals for the Ninth Circuit in the *Spitalny* case and that upon such rehearing, if a split of opinion develops between the Court of Appeals for the Tenth and Ninth Circuits that

a writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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